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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICARDO BERMUDEZ VAQUERO, on behalf of herself and all others similarly situated, Plaintiffs, v. ASHLEY FURNITURE INDUSTRIES, Inc., a Wisconsin Corporation; STONELEDGE FURNITURE LLC, a Wisconsin Limited Liability Corporation, and DOES 1 Through 10, Inclusive Defendants.	Case No.: 2:12-cv-08590-PA-MAN **CLASS ACTION** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION TO CONTINUE DATE TO FILE FOR CLASS CERTIFICATION (LOCAL RULE 23-3), OR IN THE ALTERNATIVE, COMPEL DISCOVERY**

I. INTRODUCTION

Plaintiff RICARDO BERMUDEZ VAQUERO ("Plaintiff") seeks relief from Local Rule 23-3 ("L.R. 23-3" or "Local Rule") which requires a motion for class certification to be filed "within 90 days after service of a pleading purporting to commence a class action." This is a putative wage and hour class action in which Plaintiff alleges that Defendants violated the rights of him and other employees under the California Labor Code. Because of inability to obtain all written discovery and depositions from Defendants, Plaintiff requests that this Court waive or continue the LR 23-3 requirements for the filing of Plaintiff's Class Certification Motion currently set for January 3, 2013, until Plaintiff has a reasonable opportunity to obtain the documents and depositions needed to bring the Motion.

Plaintiff has significantly reduced the number of categories of testimony requested, and the number of witnesses Defendant needs to produce to only two, they cannot be made available until December 21, 2012, and Saturday, December 29, 2012, respectively. Critical discovery responses are not due until December 18, 2012 and with the upcoming holidays, any anticipated discovery motions cannot be filed until after the Local Rule 23-3 class certification filing date, for several reasons, including that the joint stipulation required by Local Rule 37-1 may take more than a week to prepare.

In addition to the lack of necessary documents and testimony, one Plaintiff counsel's entire office is closed from December 24, 2012 through January 2, 2013, and the other primary Plaintiff's counsel has a pre-paid family vacation scheduled for December 24, 2012 through January 6, 2013.

Enforcement of Local Rule 23-3 under these circumstances would prevent necessary discovery from being taken and may conflict with the timing requirements of the Federal Rules of Civil Procedure. For the reasons discussed in this Application, Plaintiff respectfully requests the Court grant the relief requested.

II. STATEMENT OF FACTS

A. HISTORY OF PLEADINGS

Plaintiff filed his complaint on August 24, 2012 in California state court on behalf of Defendant's Sales Associates employed during the relevant time period. On October 5, 2012, Defendants removed to this Court. Plaintiff's Motion for Remand was denied without hearing.

The Early Meeting of Counsel was held November 15, 2012, and on November 26, 2012, the parties submitted their Joint Report of Early Meeting pursuant to Rule 26(f) and the Court's Scheduling Conference Order.

B. DISCOVERY REQUESTS

On September 20, 2012, Plaintiff served initial written discovery consisting of Special Interrogatories and Requests for Production of Documents to Defendants ASHLEY FURNITURE INDUSTRIES, INC. and STONELEDGE FURNITURE LLC. On October 9, 2012, Defense counsel advised the state court was divested of jurisdiction by removal and Defendants were not required to respond to the discovery requests.

During the November 15, 2012, Early Meeting of Counsel, the parties agreed a second set of Interrogatories and Requests for Production of Documents would be served on Defendant Stoneledge Furniture LLC only. They were served that day and Stoneledge's responses are due December 18, 2012.

Plaintiff also served a Notice of Deposition of Defendant Stoneledge Furniture LLC on November 15, 2012, for November 30, 2012. Defense counsel later advised Plaintiff no witnesses could be produced on that date. The parties met and conferred on available dates but all the necessary depositions could not go forward before the January 3, 2013 Local Rule 23-3 class certification filing date.

Plaintiff agreed to significantly reduce the number of PMK categories of testimony, which reduced the number of depositions needed by two or three. Even with these compromises by Plaintiff, it is not possible for even the limited number

of witnesses to be produced in a reasonable time to allow the depositions to be taken, transcripts to be obtained, and the information reviewed and incorporated in a Motion for Class Certification. Defendant was able to agree to produce one witness on December 21, 2012. The earliest date the other witness can be made available is Saturday, December 29, 2012.

Plaintiff served an interrogatory requesting contact information for the putative class. The parties met and conferred and Plaintiff sought to obtain this critical information as soon as possible. Rather than the usual privacy notice procedure which takes over thirty days from the mailing of a notice, the parties agreed Defendant would produce the names and addresses for the putative class, subject to the entry of a protective order, on December 7, 2012. The parties drafted a Joint Stipulation requesting a Protective Order be entered and filed it with the court on November 28, 2012. As of the filing of this Ex Parte Application, the Court has not acted on the proposed Order, and Defendant has not produced contact information.

The parties are informally meeting and conferring prior to receiving Defendant's outstanding discovery responses in an attempt to work through any discovery issues as soon as possible. Because the responses are not due until December 18, 2012, any anticipated discovery motions cannot be filed until after the Local Rule 23-3 class certification filing deadline, for several reasons, including and with due to the upcoming holidays, and that the joint stipulation required by Local Rule 37-1 may take more than a week to prepare.

C. PUTATIVE CLASS MEMBER INFORMATION

Plaintiff will be severely prejudiced by the lack of, and or, the late production of, contact information. Plaintiff had already agreed to accept names and addresses without telephone numbers through a protective order, rather than move to compel the information with phone numbers, to move the case more

quickly toward filing for certification.1 The parties drafted a Joint Stipulation requesting a Protective Order be entered and filed it with the court on November 28, 2012. As of the filing of this Ex Parte Application, the Court has not acted on the proposed Order. Now, three weeks from the date to file for class certification, Plaintiff still does not have even names and addresses for the class. Plaintiff is severely prejudiced by the lack of contact information.

D. DEPOSITIONS OF DEFENDANT'S WITNESSES

Plaintiff served a Notice of Deposition of Defendant Stoneledge Furniture LLC on November 15, 2012, for November 30, 2012. No witnesses could be produced on that date. The parties met and conferred on available dates, but all the necessary depositions could not go forward before January 3, 2013.

Plaintiff significantly reduced the number of PMK categories of testimony, which reduced the number of depositions needed. Even with these compromises by Plaintiff, it is not possible for even the limited number of witnesses to be produced in a reasonable time to allow the depositions to be taken, transcripts to be obtained, and the information reviewed and incorporated in a Motion for Class Certification. Defendant was able to agree to produce one witness on December 21, 2012. The earliest date the other witness can be made available is Saturday, December 29, 2012.

It will be difficult to complete the deposition scheduled for December 21, 2012, obtain a transcript, review it, and use the testimony in support of a motion for class certification. For the December 29, 2012 deposition, it will be impossible.

Cohelan Khoury & Singer's office closes each year for the holidays and will closed on December 24, 2012 and not re-open until January 2, 2013. Co-counsel Kevin Barnes has a pre-paid family vacation scheduled for December 24, 2012 through January 6, 2013. Co-counsel Raphael Katri has a pre-paid vacation

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[1] Plaintiff agreed to accept the contact information in that form without prejudice to seeking the telephone numbers at a later time.

scheduled for December 27, 2012 through December 30, 2012.

Plaintiff has already pared the depositions down to the bare minimum needed before moving for certification. Plaintiff will be severely prejudiced if Local Rule 23-3 is enforced in this situation.

III. APPLYING THE LOCAL RULE WILL PREVENT NECESSARY PRECERTIFICATION DISCOVERY, PREJUDICING PLAINTIFF AND THE PUTATIVE CLASS

Plaintiff respectfully requests this Court grant relief from L.R. 23-3 and allow necessary precertification discovery before a motion for class certification. The Court has discretion to grant this Application and allow sufficient time to perform precertification discovery before any deadline for filing a motion for class certification. *See,* Fed. R. Civ. P. 16, 23, & 26 (granting courts broad discretion over the scheduling of proceedings, discovery, and class certification); L.R. 23-3 (expressly authorizing court to order alternative schedule). In addition, applying the Local Rule may constitute an abuse of that discretion, as the Local Rule's bright-line timing standard conflicts with the "early practicable time" standard under Rule 23 as applied to the facts of this case. Based on all the circumstances of this case it is not "practicable" for Plaintiff to file a motion for class certification by January 3, 2013.

No prejudice will result to Defendant by granting this relief. Defendant does not oppose this relief and has previously stipulated to a continuance of the date for Plaintiff to move for certification.

A. FEDERAL RULES OF CIVIL PROCEDURE CONTROL OVER CONFLICTING LOCAL RULES

Rule 83 authorizes district courts to make rules governing their own procedures only if those rules *are not inconsistent with* the Federal Rules of Civil Procedure. Fed. R. Civ. P. 83(a); *Colgrove v. Battin*, 413 U.S. 149, 161 n.18 (1973); *see also Hamilton v. Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir. 1976).

Where a local rule conflicts with the Federal Rules of Civil Procedure, it is invalid to the extent that the two conflict. *United States v. Hvass*, 355 U.S. 570, 575 (1958); *Marshall v. Gates*, 44 F.3d 722, 724 (9th Cir. 1994); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S.___, 130 S. Ct. 1431, 1442 (2010). (declining to apply state law procedural rule in putative class action where the state law rule conflicted with Rule 23).

B. THE LOCAL RULE CONFLICTS WITH RULE 23 BECAUSE IT IS IMPRACTIBLE FOR PLAINTIFF TO FILE A MOTION FOR CLASS CERTIFICATION BEFORE COMPLETING PRCERTIFICATION DISCOVERY

"Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met." *Shady Grove Orthopedic Assocs., P.A,* 559 U.S.____, 130 S. Ct. 1431, 1442 (2010) (emphasis in original).

Rule 23(c)(1)(A) and L.R. 23-3 set forth conflicting standards for the timing of a class certification motion. Rule 23 instructs a Court to determine when to certify at "an early practicable time," while the Local Rule requires a motion to certify be filed "[w]ithin 90 days after service of a pleading purporting to commence a class action . . . [ ], unless otherwise ordered by the Court."

C. IT IS IMPRACTICABLE FOR PLAINTIFF TO FILE FOR CLASS CERTIFICATION IN TIME REQUIRED BY LR 23-3

An "early practicable time," will not always be ninety (90) days after filing, and it is not in this case.

"The propriety of a class action cannot be determined in some cases without discovery." *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975). Particularly in evidence-intensive wage and hour class actions such as this one, there is broad recognition that discovery, often extensive, is necessary to support a class certification motion. *See id.*

While district courts have broad discretion to control the class certification process, the Ninth Circuit has noted that "the better and more advisable practice for

a District Court to follow is to afford the litigants an opportunity to present evidence as to whether a class action [is] maintainable." *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977). *Accord Mantolete v. Bolger*, 767 F.2d 1416, 1424-25 (9th Cir. 1985).

The "parties' pleadings alone are often not sufficient to establish whether class certification is proper, and the district court [should] go beyond the pleadings and permit some discovery and/or an evidentiary hearing to determine whether a class may be certified." *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309, n. 14 (11th Cir. 2008); *see also In Re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996) ("The court should defer decision on certification pending discovery if the existing record is inadequate for resolving the relevant issues") (citation and internal punctuation omitted).

The Ninth Circuit has noted, in some circumstances, "the failure to grant discovery before denying class treatment is reversible error." *Doninger*, 564 F.2d at 1313**.** "In determining whether to grant discovery the court must consider its need, the time required, and the probability of discovery resolving any factual issue necessary for the determination." *Kamm*, 509 F.2d at 210; *Yaffee v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972).

It is impracticable for Plaintiff to file a motion for class certification in this case without first having an adequate opportunity to conduct precertification discovery. The use of the term "practicable" in Rule 23 creates a flexible standard that reflects the necessity of adequate discovery being available to a plaintiff before being required to file a motion for class certification. *See* Fed. R. Civ. P. 23(c)(1) (2003), Advisory Committee Notes.

Plaintiff has not had an opportunity to conduct adequate discovery and, as a result, cannot move for class certification in the time required by Local Rule 23-3.

IV. CONTINUING THE DATE FOR CERTIFICATION, OR IN THE ALTERNATIVE, ORDERING DISCOVERY

If the date to file for class certification is not continued, Plaintiff must request the following discovery orders, in the alternative:

A. Defendant Stoneledge be ordered to provide to Plaintiff, no later than December 18, 2012, contact information for the putative class, including telephone numbers.

B. Defendant Stoneledge be ordered to provide to Plaintiff, no later than December 18, 2012, all compensation plans which applied to the putative class of California Sales Associates.

C. Defendant Stoneledge be ordered to provide to provide to Plaintiff, no later than December 18, 2012, documents showing hours worked by a random sample of 20% of California Sales Associates from August 24, 2008 to the present, as requested in Plaintiff Request for Production of Documents, Set No. 2, Request 6.

D. Defendant Stoneledge be ordered to provide to provide to Plaintiff, no later than December 18, 2012, payroll records for 20% sample of California Sales Associates as requested in Plaintiff Request for Production of Documents, Set No. 2, Request 7.

E. Defendant Stoneledge be ordered to produce Troy Muller on December 19, 2012 or 20, 2012, for deposition in Los Angeles County, California.

F. Defendant Stoneledge be ordered to produce Jose de la Pena on December 20, 2012, or December 21, 2012, for deposition in Los Angeles County, California.

If the Court cannot grant this relief ex parte, Plaintiff requests the Court shorten the time within in which a motion can be brought, waive the requirements of Local Rule Local Rule 37-1, and hear the motion at the earliest possible date.

V. CONCLUSION

Plaintiff respectfully requests this court grant this ex parte application and continue the date for a motion for class certification to be filed, by ninety (90) days. This will allow discovery to be taken, and should allow any discovery issues to be resolved.

Dated: December 12, 2012

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